86 2020

Supreme Court, U.S.
FILED
JUN 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

CAROL MACZKO

Petitioner,

vs.

TERRENCE JOYCE
Officer in Charge
United States Postal Service

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit

Judith A. Nicely, Counsel of Record
500 Society Building
Akron, Ohio 44308
216/762-0771

Attorney for Petitioner,
Carol Maczko

QUESTION PRESENTED

Pursuant to 28 U.S.C. §1361 and §1651, does the Federal District Court have jurisdiction to order a writ of mandamus to compel the United States Postal Service Agency in Akron, Ohio, to comply with the EEOC Attorney Examiner's decision and recommended action once an "adoption" of such a decision has taken effect and petitioner has no remedy at law?

PARTIES BELOW

The parties below were Petitioner, Carol Maczko, Appellant in the United States Court of Appeals Sixth Circuit and Respondent-Appellee, Terrence Joyce, Officer in Charge, United States Postal Service, Akron, Ohio, in the United States Court of Appeals Sixth Circuit. Copies of the petition and all other

briefs were mailed to the Office of Labor Law, U. S. Postal Service in Washington D.C., the Assistant U. S. Attorney General in Cleveland, Ohio, and the Department of Justice, U. S. Attorney General's Office in Washington D.C.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW i

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTION AND STATUTORY PROVISIONS RELIED UPON. 3

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT. . .8

I. THE FEDERAL DISTRICT COURT HAS JURISDICTION TO ORDER A WRIT OF MANDAMUS TO COMPEL THE UNITED STATES POSTAL SERVICES AGENCY IN AKRON, OHIO, TO COMPLY WITH THE EEOC ATTORNEY EXAMINER'S DECISION AND RECOMMENDED ACTION . . .8

CONCLUSION 16

APPENDIX:

United States Code §1361 . .A1

United States Code §1651 . .A1

Decision of the United States Court of Appeals for the Sixth Circuit (March 20, 1987). . .A3

Finding of the Equal
Employment Opportunity
Cleveland District Office
(September 28, 1984) A8

Letter United States Postal
Service to Carol Maczko . . .A22

Notice from the Equal
Employment Opportunity
Commission A26

Finding of the United States
District Court
(February 27, 1986) A28

Order of the United States
District Court
(February 27, 1986) A41

Notice of Appeal
(March 20, 1986) A42

Response to Defendant's
Motion to Dismiss
(February 14, 1986) A43

TABLE OF AUTHORITIES

Cases

Hagans v. Lavine, 415 U.S. 538 (1974) 11

Short v. Murphy, 512 F.2d 374 (6th Cir. 1975) 14

Statutes

28 U.S.C. §1361 3,6,11,16

28 U.S.C. §1651 3,6,12,16

Regulations

Equal Employment Opportunity Commission § 1613.220(d) . . . 9,16

No.

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

CAROL MACZKO

Petitioner,

vs.

TERRENCE JOYCE
Officer in Charge
United States Postal Service

Respondent.

* * * * *

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Sixth Circuit

The Petitioner, Carol Maczko, respectfully requests that a Writ of Certiorari issue to review the United States Court of Appeals for the Sixth Circuit judgment which was filed and decided on March 20, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit filed and decided on March 20, 1987, (Appendix A3-A7).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 20, 1987. The United States Court of Appeals for the Sixth Circuit affirmed the district court's holding that petitioner's request for a writ of mandamus lacked subject matter jurisdiction. This petition for a writ of certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS RELIED UPON

28 U.S.C. §1361

The district courts shall have original jurisdiction of any action in the nature of Mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. (Appendix A1).

28 U.S.C. §1651 (A)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (Appendix A1-A2).

STATEMENT OF THE CASE

Carol Maczko, Petitioner-Appellant, began as a distribution clerk with the United States Postal Service Agency on November 19, 1977.

In 1979, Carol Maczko was hospitalized and treated for a blood clot in her right leg. She returned to work in February 1980. Four months later she was again hospitalized for the same condition. In July 1981, one year later, the Postal Services Agency denied Carol Maczko's request for return to work with her doctor's written restrictions.

The initial complaint was filed with an EEO officer on August 3, 1981. The complaint was investigated and denied. Carol Maczko appealed the decision and requested a hearing. An Attorney Examiner of the Equal Employment Opportunity Commission conducted a hearing on August 13, 1984. The Attorney Examiner recommended a finding of discrimination based on handicap.

On September 28, 1984, The Attorney

Examiner recommended that:

(Petitioner) be reinstated with reasonable accommodation; be awarded back pay, seniority and benefits that may have accrued since the effective date of the denial of the (Petitioner's) request for light duty deducting any duplicative award the (Petitioner) may have received prior to the issuance of this decision. (Appendix A21).

On December 15, 1984, the United States Postal Services Agency wrote a letter to Carol Maczko stating:

"our final agency decision is to adopt the Complaints Examiner's recommendation. Be further advised, you are to be afforded the relief stipulated in the attached copy of the Examiner's recommendation." (Appendix A22-A26).

Carol Maczko had twenty (20) days to appeal to the EEOC or thirty (30) days to appeal in an appropriate United Stated District Court. Carol Maczko did not appeal the Agency's decision because the decision was in her favor. From December 15, 1984, to August of 1985, petitioner received nothing from respondent.

On August 23, 1985, she filed a petition for a writ in the federal district court pursuant to 28 U.S.C. §1361 and 28 U.S.C. §1651. She alleged she had not been reinstated with reasonable accommodation and she had not received her back pay, seniority and other benefits which had accrued from June 29, 1981 through April 17, 1985.

After filing her petition for a writ of mandamus, the United States Postal Services Agency paid Carol Maczko, Forty

Six Thousand Dollars Four Hundred Twenty Three Dollars ($46,423.00). However, Carol Maczko's total damages were One Hundred and Twelve Thousand Four Hundred Ninety One ($112,491.00). Hence, the reason for this appeal.

On January 27, 1986, The Assistant U.S. Attorney filed a motion to dismiss Carol Maczko's petition for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. On February 27, 1986, the Court dismissed Carol Maczko's petition and held the Court lacked subject matter jurisdiction. (Appendix A28-A41).

Appeal to the Sixth Circuit was filed on March 20, 1986. (Appendix A42-A43). The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision March 20, 1987.

REASON FOR GRANTING THE WRIT

I. THE FEDERAL DISTRICT COURT HAS JURISDICTION TO ORDER A WRIT OF MANDAMUS TO COMPEL THE UNITED STATES POSTAL SERVICES AGENCY IN AKRON, OHIO, TO COMPLY WITH THE EEOC ATTORNEY EXAMINER'S DECISION AND RECOMMENDED ACTION.

Carol Maczko has a right to full back pay, seniority and benefits pursuant to the EEOC's Attorney Examiner's final decision which is binding on the Postal Service Agency.

The facts in this case are unique to federal employees who have their discriminatory matters decided by EEOC, in contrast to other employees who have direct access to federal court. Being a federal employee, petitioner took her original claim to EEO. Upon an

unfavorable decision, petitioner then appealed to the EEOC. The EEOC Attorney Examiner found a case of discrimination based on handicap and recommended that backpay, seniority and benefits be awarded to petitioner. Respondent adopted the recommended action. Pursuant to § 1613.220 (d) of part 1613 of EEOC's regulations, the Attorney Examiner's recommended decision finding discrimination and the corrective action recommended therein shall become the final decision binding on the Agency. (Appendix A26-A27).

This is a case of first impression. There is no case law where a writ of mandamus was requested or issued to enforce a binding EEOC decision. Petitioner exhausted all administrative remedies, waived her right to appeal to

the EEOC and file a civil action in federal court when she accepted the Postal Service's decision to adopt the EEOC Attorney Examiner's recommendations. Therefore, she has no remedy at law!

This case is important to the large number of federal employees who have, or will in the future have, discrimination matters that are decided by the EEOC. Because these decisions are binding upon acceptance by the federal agency, the law should strictly enforce complete adherence to the accepted EEOC decisions. To allow the federal agencies to arbitrarily pick and choose which EEOC decisions they will follow is grossly unfair to the many federal employees who will be at the agency's mercy.

The federal district court has jurisdiction to order a writ of mandamus

to compel the United States Postal Services Agency in Akron, Ohio, to comply with the EEOC Attorney Examiner's decision and recommended action.

The trial court cited Hagans v. Lavine, 415 U.S. 538 (1974), to support its ruling that the court lacked subject matter jurisdiction. However, the court in Hagans found subject matter jurisdiction. In Hagans, welfare recipients claimed that the state's recoupment of rental payments from their AFDC payments was unconstitutional. Petitioner's claim is also a human rights issue supported by statutes and is not so attenuated or unsubstantial to be devoid of merit.

There is subject matter jurisdiction pursuant to 28 U.S.C. §1361. The United States Postal Services Agency has a duty

to fully comply with the EEOC Attorney Examiner's decision and recommended action once it adopts the holding as its final decision. (Appendix A26-A27). The adoption of the Attorney Examiner's report and recommendation by respondent was therefore required and ministerial and not a discretionary act.

28 U.S.C. §1651 (A) states that, "All courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. . ." This writ of mandamus is necessary and appropriate.

Petitioner has no other adequate remedy at law. Petitioner did not exercise her right to appeal the adoption of the Attorney Examiner's recommendation to the EEOC because she felt she was going to be treated fairly and justly as

indicated to her by the United States Postal Services Agency in their letter dated December 15, 1984. After the time allowable for an appeal had lapsed, the respondent altered its portion of the agreement and paid petitioner less than one-half of the agreed compensation. Petitioner now seeks a writ of mandamus to compel respondent to comply completely with the recommendations set forth in the Attorney Examiner's report. The writ of mandamus is a proper remedy in this case.

Although the district courts are by statute vested with original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to petitioner, Mandamus will not be unless the alleged duty imposes a mandatory or ministerial

obligation. If the alleged duty is discretionary, the duty is not owed. Short v. Murphy, 512 F.2d 374, 377 (6th Cir. 1975).

The respondent adopted the Attorney Examiner's decision and recommendations and neither party appealed this adoption, therefore, the Attorney Examiner's report is statutorily imposed upon the respondent. (Emphasis Added). Respondent has a mandatory duty to comply with the Attorney Examiner's Report. The writ of mandamus is the proper and only remedy in this case.

On May 19, 1979, the United States Postal Service classified petitioner as a regular full time employee. This status was never changed. The Attorney Examiner's recommendation did not reclassify petitioner, it merely stated

the effective dates in which the back pay, seniority, and benefits accrued.

Petitioner understood that as a regular full time employee she was entitled to eight hours of back pay per day. In fact, in a letter dated August 14, 1985, the United States Postal Service informed her that they had calculated her back pay as such and then deducted four hours per day for OWCP-LWOP (Office of Worker's Compensation Program Leave Without Pay). Petitioner never received any award from OWCP-LWOP or any other agency.

To date, the United States Postal Services Agency's action constitute only partial compliance with the Attorney Examiner's recommended corrective action. Complete compliance would include one hundred percent back pay, seniority, and

benefits for a full time employee position from June 29, 1981 through April 17, 1985.

CONCLUSION

Petitioner's only remedy is a writ of mandamus. This case is important for all federal employees who have final and binding EEOC decisions. The adoption of the Attorney Examiner's report and recommendations by respondent became a required and ministerial act according to § 1613.220(d) of the EEOC's regulations. The lower courts misapprehended the law and misapplied the purpose of extraordinary writs.

Pursuant to 28 U.S.C. §§1361 and §1651, the federal district court has jurisdiction to order writ of mandamus to

compel the United States Postal Service Agency in Akron, Ohio, to comply with the adopted findings and recommendations.

Respectfully submitted,

Judith A. Nicely, Counsel of Record

500 Society Building
Akron, Ohio 44308
216/762-0771

Attorney for Petitioner,

Carol Maczko

APPENDIX

§ 1361. Action to compel and officer of the United States to perform his duty.

The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Added Pub.L. 87-748 §1(a), Oct. 5, 1962, 76 Stat. 744.

§ 1651. Writs (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

No. 86-3296

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAROL MACZKO,
Plaintiff-Appellant,
v.
TERRENCE JOYCE, Officer in Charge, United States Postal Service,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed March 20, 1987

Before: MARTIN and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Plaintiff-appellant Carol Maczko appeals from the district court's order dismissing her request for a writ of mandamus. The district court held that it lacked subject matter jurisdiction to issue a writ. For the reasons which follow, we affirm.

I.

Appellant began working at the United States Postal Service in Akron, Ohio, in November 1977. On two occasions in 1979 and 1980, she was hospitalized for a condition which

was subsequently diagnosed as thrombophlebitis. When she requested to be reinstated to her former position in July 1981, the Postal Service denied her request. Thereafter, appellant filed a complaint with the EEOC alleging handicapped discrimination. Although the complaint was initially denied, a complaints examiner, after conducting a hearing on appellant's complaint, recommended on September 28, 1984, a finding of discrimination. Further, the complaints examiner recommended that, "the Complainant be reinstated with reasonable accommodation; be awarded backpay, seniority and benefits that may have accrued since the effective date of the denial of the Complainant's request for light duty deducting any duplicative award the Complainant may have received prior to the issuance of this decision." The Postal Service adopted this decision on December 15, 1984. No appeal was taken, and no further proceedings to clarify the EEOC's decision ensued.

Appellant filed the instant petition in the United States District Court for the Northern District of Ohio on August 23, 1985. She alleged that the Postal Service had failed to comply with the EEOC's recommended corrective action in that she had not received backpay and she had not been reasonably accommodated. Her petition requested that a writ of mandamus be issued compelling the Postal Service to comply with the EEOC decision. Although the Postal Service paid appellant $46,423 subsequent to the filing of her complaint, appellant has consistently maintained that the EEOC's decision entitles her to approximately $112,490 in backpay.

Defendant filed a motion to dismiss appellant's complaint for lack of subject matter jurisdiction, which motion was granted by the district court on February 27, 1986. The court first noted that the All Writs Act, 28 U.S.C. § 1651, did not confer subject matter jurisdiction on federal courts, but only conferred authority to issue writs if an independent basis for subject matter jurisdiction exists. The court next concluded that jurisdiction did not exist under 28 U.S.C. § 1361 because

appellant's request did not involve "the mere ministerial or mandatory duty of a federal official." Further, the court reasoned that jurisdiction to issue a writ of mandamus did not exist under section 1361 when the claim involved unliquidated damages. Finally, the court held that subject matter jurisdiction did not exist under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, because appellant had failed to comply with the procedural requirements of that statute.

II.

On appeal, appellant maintains that subject matter jurisdiction exists under either 28 U.S.C. §§ 1651(a) or 1361, or under the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*[1] We reject her assertions.

As an initial matter, we note that, before the district court, appellant did not raise the Rehabilitation Act as a basis for establishing jurisdiction. Accordingly, we decline to address this argument for the first time on appeal. *See Sigmon Fuel Co. v. TVA*, 754 F.2d 162, 164-65 (6th Cir. 1985).

Second, we note that the district court was correct in observing that it is well settled that a federal court must have an independent basis for subject matter jurisdiction for a writ of mandamus to be issued pursuant to 28 U.S.C. § 1651(a).[2] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980) (per curiam); *Haggard v. Tennessee*, 421 F.2d 1384, 1386 (6th Cir. 1970). Accordingly, if subject matter jurisdic-

---

[1]Appellant no longer asserts that subject matter jurisdiction exists pursuant to Title VII.

[2]Section 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

tion exists in the instant case, it must be established under 28 U.S.C. § 1361.

Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The existence of jurisdiction under section 1361 is inextricably bound with the merits of whether a writ of mandamus should issue; in order to establish either jurisdiction or entitlement to the writ, a court must find that a duty is owed to the plaintiff. *See Vishnevsky v. United States*, 581 F.2d 1249, 1253 n.4 (7th Cir. 1978).

For there to be a "duty owed to the plaintiff" within the meaning of section 1361, there must be a "mandatory or ministerial obligation. If the alleged duty is discretionary or directory, the duty is not 'owed.' " *Short v. Murphy*, 512 F.2d 374, 377 (6th Cir. 1975). A duty is not "owed" unless the obligation is " 'plainly defined and peremptory.' " *United States v. Battisti*, 486 F.2d 961, 964 (6th Cir. 1973) (quoting *Albert v. United States Dist. Court*, 283 F.2d 61, 62 (6th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961)). *See also Martins Ferry Hosp. Ass'n v. NLRB*, 654 F.2d 455, 456 (6th Cir.) (per curiam), *cert. denied*, 454 U.S. 1083 (1981); *Vishnevsky*, 581 F.2d at 1253.

Although the Postal Service had a duty to comply with the EEOC decision, the terms of that order are not readily ascertainable; in fact, the parties disagree as to the meaning of the final order concerning the amount of backpay required. We conclude that when a duty is disputed or subject to various interpretations, for instance when unliquidated damages are involved, the duty is not "owed" in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial within the meaning of section 1361.

See Pope v. United States, 9 Cl. Ct. 479 (1986) (no jurisdiction under section 1361 to mandamus payment for unliquidated damages); *Hudiburgh v. United States*, 626 F.2d 813, 814 (10th Cir. 1980); *Spaulding v. Nielsen*, 599 F.2d 728, 730 (5th Cir. 1979) (per curiam). Since appellant seeks a writ of mandamus to enforce a provision of an EEOC decision which is subject to differing interpretations and is in fact disputed, we conclude that subject matter jurisdiction does not exist under section 1361.

Accordingly, we AFFIRM the judgment of the district court dismissing appellant's petition for lack of jurisdiction.

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY
CLEVELAND DISTRICT OFFICE

(Dated 9-28-84)

Case No. 052-82-X0117

CAROL MACZKO

Complainant

vs.

UNITED STATES POSTAL SERVICE

Pursuant to notice, the above styled complaint was heard before Charetta T. Harrington, Attorney Examiner, Equal Employment Opportunity Commission, at the United States Postal Service, Akron, Ohio on August 13, 1984.

APPEARANCES:

For The Complainant:

David Harford
1190 Canyon Street,
N.E.
Uniontown, OH 44685

For the Agency:

Lawrence E. Frichel
Labor Relations Representative
U.S. Postal Service
Akron, OH 44309

ACTING DISTRICT DIRECTOR:

Harold Ferguson
Equal Employment Opportunity Commission
1375 Euclid Avenue, Suite 600
Cleveland, OH 44115

REFERENCE CODE:

HT	Hearing Transcript
IR	Investigative Report
AFF	Affidavit
Exh.	Exhibit
EE	Examiner's Report
EEO	Counselor's Report

I. INTRODUCTION

Carol Maczko (hereinafter referred to as Complainant) former Distribution Clerk requested a hearing on her complaint that the U.S. Postal Serviced (hereinafter referred to as Agency)

discriminated against her because of her sex (female), reprisal and physical handicap (thrombophlebitis).

A hearing on her complaint was held on August 13, 1984. One witness testified and two exhibits were added to the record.

II. BACKGROUND

The Complainant contacted an EEO Counselor on August 3, 1981.

The EEO Counselor conducted an informal inquiry into the matter but was unable to resolve the complaint to the Complainant's satisfaction.

The complaint was investigated on February 16-17, 1982. Notice of Proposed Disposition was issued by the

Agency on August 10, 1982 wherein it was found that there was no evidence to support an allegation of discrimination based on sex (female, reprisal and physical handicap (thrombophlebitis).

This proposed disposition was unacceptable to the Complainant. By letter dated August 25, 1981, the Complainant advised the Agency of her dissatisfaction and requested a hearing. The Agency requested an Attorney Examiner of the Equal Employment Opportunity Commission to conduct the hearing by letter dated August 31, 1982.

III. ISSUE

Whether or not the Agency discriminated against the Complainant

because of her sex (Female), reprisal and physical handicap (thrombophlebitis) when she was not allowed to return to work on June 29, 1981?

IV. FINDINGS AND ANALYSIS

The Complainant began her postal career as a Distribution Clerk on November 19, 1977.

In April, 1979 the Complainant was hospitalized and treated for a blood clot in her right leg. The Complainant testified that upon her return to work ten months later in February, 1980, she was placed on light duty.

The Complainant's physician indicated in his report to the Agency on February 7, 1980 that the Complainant's

workday should be limited to a four hour workday.

He further recommended that the Complainant perform office type duties or duties that would allow her to sit because prolonged standing or sitting would result in excessive pain to the Complainant.

The Agency followed the physician's instructions and granted the Complainant light duty which included a four hour work day with sedentary work. The Complainant testified that she was not allowed to walk for a half hour as instructed by her physician and she could not elevate her legs. These factors resulted in recurrence of the

illness stated the Complainant.

The record reflects that on June 18, 1980, four months later, the Complainant suffered a recurrence of the thrombophlebitis symptoms and was hospitalized and treated.

One year later in July, 1981, the Complainant requested the Agency to grant her a light duty assignment with the work restrictions requested by her physician.

A duty status report dated June 11, 1981 and completed by Dr. T. H. Tang indicated that the Complainant suffered from chronic myositis and phlebitis of the lower extremeties. Dr. Tang further stated that the Complainant's back

should be "supported fully while sitting" and that the Complainant should "try" working four hours per day.

The Agency denied the Complainant's request for light duty because there was no light duty available with the limitations set forth by her doctor.

Finally, the Complainant's work performance is not at issue. The record clearly shows that the Complainant was able to perform the duties of her job while on light duty.

V. CONCLUSION

The issue presented is whether the Agency discriminated against the Complainant in denying the Complainant's request for a light duty assignment.

EEOC Regulations, at 29 C.F.R. 1613.703, provide in part that "An Agency shall not discriminate against a qualified physically or mentally handicapped person." The Regulations further provide that, "An Agency shall make reasonable accommodation to the known physical limitations of a qualified handicapped employee. . .The Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. 1613.704(a)

The Complainant can establish a prima facie case of discrimination by showing that: (1) she is a "handicapped person" within the meaning of 29

C.F.R. 1613.702(a) and (2) she is "qualified" for the position, with or without accommodation within the meaning of 29 C.F.R 1613.702(f).

If the Complainant satisfies the above criteria, the burden then shifts to the Agency to show by demonstrable evidence that it could not accommodate the Complainant without undue hardship. Thereafter, the Complainant has the right to challenge the Agency's position by showing that reasonable accommodation is possible. See, Prewitt v. U.S. Postal Service, 622 F. 292 (5th Cir. 1981).

The Regulations define a "handicapped person", in part, as one

who: "Has a physical impairment which substantially limits one or more of such person's major life activities,. . .or. . .is regarded as having such impairment." The regulations at 29 C.F.R. 1613.702(c) specifically state, in part, that "major life activities" include "working and walking."

The Complainant has established that she is a handicapped person. The evidence is clear that the physiological condition of the Complainant's lower extremities resulted in the loss of their use and thereby resulted in the Complainant being unable to work.

The Complainant has also established that she is a qualified

handicapped person, meaning a handicapped person, who with or without accommodation can perform the essential duties of the job without endangering the health and safety of herself or others.

The Complainant has established that she performed the duties of the job in a satisfactory manner with accommodation and without endangering the health or safety of the Complainant or fellow employees.

It is now the Agency's burden to show that reasonable accommodation could not be made to the known physical handicap of the Complainant without imposing an undue hardship upon the

Agency's operation.

The Agency has not met its burden. The Agency made conclusory statements in the investigative report, but no evidence, that the Complainant's limitations could not be accommodated without undue hardship to the Agency.

The evidence is clear that the Complainant had been performing satisfactorily for approximately four months with minimal accommodation by the Agency. There was no evidence to show why the same or similar accommodation could not be granted.

Finally, the Examiner concludes that there was no credible or relevant evidence to demonstrate that the

Complainant has satisfied the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) allocation of burdens of proof in a Title VII case alleging disparate treatment because of sex and reprisal.

VI. RECOMMENDED FINDING

The Examiner, therefore, recommends a finding of discrimination bases on handicap and no discrimination based on sex and reprisal.

VII. RECOMMENDED CORRECTIVE ACTION

The Examiner recommends that the Complainant be reinstated with reasonable accommodation; be awarded backpay, seniority and benefits that may have accrued since the effective date of

the denial of the Complainant's request for light duty deducting any duplicative award the Complainant may have received prior to the issuance of this decision.

/s/ Charetta T. Harrington
ATTORNEY EXAMINER
Equal Employment Opportunity Commission

LETTER FROM THOMAS W. J. FRITSCH, UNITED STATES POSTAL SERVICE, TO CAROL MACZKO

DATE: December 15, 1984

OUR REF: CE231:JA Helem,Sr:ym:-0231

SUBJECT: Docket Number 052-82-X0117
EEO Complaint Number
4-2-0058-2

TO: Carol Maczko
1130 Dayton Street
Akron, OH 44310-1113

This refers to your complaint of sex (Female), reprisal, and physical handicap (Thrombophlebitis) discrimination filed with the EEO Officer, As a result of that hearing,

the Complaints Examiner recommended a finding of discrimination based on your handicap.

Be advised, our final agency decision is to adopt the Complaints Examiner's recommendation. Be further advised, you are to be afforded the relief stipulated in the attached copy of the Examiner's recommendation.

Your complaint is now closed with a finding of discrimination due to your physical handicap and a finding of no discrimination due to your sex or reprisal.

If you are dissatisfied with this final decision, you may appeal to the Equal Employment Opportunity Commission within 20 calendar days of receipt of the decision. The appeal shall be in writing and filed in duplicate with the

Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, DC 20507-0001. Any supporting statement or brief must be submitted, in duplicate, to the Commission within 30 calendar days of filing the appeal. A copy of the appeal and any supporting documentation shall also be submitted to the Manager, EEO Branch, Central Region, room 1036, U. S. Postal Service, chicago, Illinois 60699-0231. Failure to file within the 20-day period could result in the Commission's rejection of the appeal unless you explain, in writing, extenuating circumstances which prevented filing within the prescribe time limit. In this event, extending the time limit and accepting the appeal will be discretionary with the

Commission.

If you elect to appeal to the Commission's Office of Review and Appeals, you may file a civil action in an appropriate U. S. District Court within 30 calendar days of receipt of the Commission's final decision. In lieu of an appeal to the Commission, you may file a civil action in n appropriate U. S. District Court within 30 calendar days of receipt of this final agency decision. A civil action may also be filed anytime after 180 calendar days of the date of initial appeal to the Commission, if a final decision has not been rendered.

/s/ Thomas J. Fritsch
Regional Director
Employee and Labor Relations

Attachment

cc: District Director, E&LR

David Harford
1190 Canyon Street, N.E.
Uniontown, OH 44685-8510

NOTICE

Pursuant to Section 1613.220(d) of part 1613 of the Equal Employment Opportunity Commission's regulations, the Attorney Examiner's recommended decision finding discrimination and the **CORRECTIVE ACTION RECOMMENDED THERREIN SHALL BECOME THE FINAL DECISION BINDING ON THE AGENCY** if the Agency has not issued a final decision adopting, rejecting, or modifying the recommended decision by the later of the following two dates: (1) within 30 calendar days after the date the Agency received the recommended decision, or (2) within 180 calendar days of the date on which the complaint was filed. In such event, the Agency shall notify the Complainant that

pursuant to Section 1613.220(d) of part 1613 of the equal Employment Opportunity Commission's regulations the Attorney Examiner's recommended decision is the Agency's final decision and furnish to him (her) a copy of the findings, analysis, and recommended decision of the Attorney Examiner under Section 1613.218(g) and a copy of the hearing record. The Agency shall also notify the Complainant in writing of his (her) right to appeal to the Commission and the time limits applicable thereto and of his (her) right of appeal to the Commission and the time limits applicable thereto and of his (her) right to file a civil action as described in Section 1613.281. The right-to-sue portion should not be included in age or handicap cases

(Section 1613; F P M Letter 713-43(9)).

FINDING OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed February 27, 1986)

Case No. C85-2431-A

CAROL MACZKO

Plaintiff

vs.

TERRENCE JOYCE

Defendant

and

DAVID H. HARFORD

Plaintiff

vs.

TERRENCE JOYCE

Defendant

ORDER

On August 23, 1985, the plaintiffs,

Carol Maczko and David H. Harford respectively, filed the above-entitled petitions for writs against Terrance Joyce, the Officer in Charge of the United States Post Office in Akron, Ohio. The plaintiffs are both employees of the Postal Service and they seek in their petitions a mandatory injunction against the defendant directing him "to comply with the final decision(s) and recommended corrective action of the EEOC which was dated December 15, 1984." This court's subject matter jurisdiction is allegedly invoked pursuant to 28 U.S.C. §1361 and 28 U.S.C. §1651.

Presently before this court is a motion to dismiss both petitions on the grounds that no subject matter jurisdiction exists in this court. In addition, the defendant claims that the

petition as a matter of law fails to state a claim for relief against Mr. Joyce as the Officer in Charge of Akron Post Office. The plaintiffs have responded to the motion.

For the purposes of reviewing this motion to dismiss all of the material allegations of fact contained in the plaintiff's complaint are to be taken by the court as admitted. Worth v. Seldin, 422 U.S. 490 (1975); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Gardner v. Torlet Goods Ass'n, 387 U.S. 167, 172 (1967). Thus according to this standard, the facts are as follows.

Carol Maczko has been employed at the Akron Office of the Postal Service since 1977. In 1981, she filed a complaint against her employer with the Equal Employment Opportunity Commission

(hereinafter EEOC), based upon alleged sex, reprisal and handicap discrimination. On September 28, 1984, the examiner for EEOC found that Maczko had been discriminated against on the basis of her handicap. The examiner found no discrimination based upon her sex or reprisal. this decision was adopted as the final agency decision on December 15, 1984.

David Harford has also been employed at the Akron office of the Postal Service. On March 19, 1981, Mr. Harford filed a complaint with the EEOC wherein he alleged he was being discriminated against by the Postal Service because of his race, sex, reprisal and physical handicap. On September 5, 1984, the EEOC examiner found that Harford had also been

discriminated against on the basis of his physical handicap. The examiner found no discrimination on the bases of his race, sex or reprisal. This decision was adopted with some modification as the final agency decision on October 19, 1984.

In notification forms Maczko and Harford were respectively advised that if they were dissatisfied with the agency decision they could appeal the decision, within a specified time period, to either the EEOC or to a federal district court. No appeal was ever filed by any party to either the EEOC or an appropriate United States District Court. Thereafter, the Postal Service paid the back wages which it determined to be due and made positions available for the petitioners at the

Akron Post Office. The petitioners dispute the amounts of back wages due to them under the decision of the EEOC and also seek different positions at the Post Office.

The defendant contends that this court lacks the required subject matter jursidiction to grant the relief being sought in the petition. Federal district courts created under article III of the United States Constitution are courts of limited subject matter jurisdiction. Hagans v. Lavine, 415 U.S. 538 (1974). A federal court's jurisdiction is derived from the constitution, but Congress is empowered to decide the extent of original subject matter jurisdiction that is to be conferred upon the district courts. Id. As a result of this limitation, any

action taken by a district court is only entitled to enforcement if the court has jurisdiction over the subject matter.

In light of the limitations placed on a district court's jurisdiction, when a court considers a motion to dismiss raising several grounds for dismissal, the first issue which must be addressed is whether subject matter jurisdiction is proper. Consideration of any other alleged grounds for dismissal would be improper until the court has determined that jurisdiction is present in the action. Tuck v. Pan American Health Organization, 688 F.2d 547 (D.C. Cir. 1981); Memphis Am. Fed. of Tchers., L. 2032 v. Board of Ed., 534 F.2d 699 (6th Cir. 1976). The burden of proving that subject matter jurisdiction is present in the district court is upon the party

asserting jurisdiction, which in this action would be the petitioner. McNuttt v. General Motors acceptance Corp., 298 U.S. 178 (1936).

The plaintiffs allege in their complaints that this court's jurisdiction is invoked under the all writs statute, 28 U.S.C. §1651, which follows, "(a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. This statute has been uniformly construed by the federal courts to not confer any subject matter jurisdiction upon the courts.

Instead, congress, in passing the all writs statute, provided the federal courts with the authority to issue writs when necessary if there exists an independent basis for subject matter jurisdiction. In this regard, the Sixth Circuit has stated that, "It is settled that a federal court has not general jurisdiction to issue writs of mandamus where that is the only relief sought. In absence of special statutory authority it can issue writs of mandamus only as ancillary to and in aid of jurisdiction otherwise vested in it. Hertz v. Record Publishing Co., 219 F.2d 397 (3d Cir. 1955), cert. denied, 349 U.S. 912, 75 S. Ct. 601, 99 L. Ed. 1247 (1955). Haggard v. State of Tennessee, 421 F.2d 1384, 1386 (6rh Cir. 1970). Therefore, the petitioners may not rely

upon the all writs statute to confer subject matter jurisdiction over these actions. This statute can only assist the court in providing a remedy when an independent basis for jurisdiction is present.

The second basis for jurisdiction alleged in the petitions is pursuant to 28 U.S.C. §1361 which follows, "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." This statute does confer original subject matter jurisdiction in the district court to compel a federal officer to perform some "purely ministerial duty." Work v. United States ex rel. Rivis, 267 U.S.

175, 177 (1925). "This language has been construed uniformly to mean that mandamus will not lie unless the alleged duty imposes a mandatory or ministerial obligation. If the alleged duty is discretionary or directory, the duty is not owed." Short v. Murphy, 512 F.2d 374, 377 (6th Cir. 1975). Thus, the issue before this court is whether the petitions seek an order directing the postal officials to perform some mandatory or ministerial obligation or if the petition seeks an order which involves some discretionary duty.

In these actions, it is clear that the order being sought by the petitioners does not involve the mere ministerial or mandatory duty of a federal official. Instead, the petitioners seek to have this court

enforce and interpret the final agency decisions of October 19, 1984 and December 15, 1984. In addition, the petitioners are seeking damages and a determination by this court of the back pay and benefits previously awarded in the final agency decisions. However, the law is settled that the mandamus statute does not confer any subject matter jurisdiction in the district courts to permit the adjudication and awarding of unliquidated and disputed sums as damages. United States v. Pennsylvania, 394 F.Supp. 261 (M.D. Pa. 1975).

The petitioners further contend in their briefs but not in their petitions that this court can obtain original jurisdiction over these proceedings under Title VII of the Civil Rights Act

of 1964, 42 U.S.C. §2000 et seq. This contention is without merit since a federal district court can only obtain jurisdiction over a Title VII dispute when the procedural requirements set forth in the act are invoked. The Supreme Court has recently held that these procedural requirements for invoking the court's jurisdiction should be strictly applied. See Baldwin County Welcome Center v. Brown, ___ U.S. ___, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

The petitions in these actions were filed long after the 30-day period from receipt of the Commission's final decision as required under Title VII. Specifically, the Harford petition was filed approximately ten months after receipt of the final agency decision. The Maczko petition was filed

approximately months after receipt of the Commission's final decision both petitions are beyond the period required by the act and cannot be construed to confer any jurisdiction upon this court under Title VII.

Accordingly, the court hereby grants the defendant's motion to dismiss and finds that this court lacks and subject matter jurisdiction over the petitions.

IT IS SO ORDERED.

/s/ Judge Sam H. Bell

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 27, 1986)

Case No. C85-2431-A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CAROL MACZKO

Plaintiff

vs.

TERRENCE JOYCE

Defendant

The court having filed its order of decision of the matters in this action, therefore, pursuant to Fed. R. Civ. P. 58,

IT IS ORDERED that this action is hereby terminated.

/s/ Judge Samuel Bell

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

(Filed March 20, 1986)

Case No. C85-2431A

CAROL MACZKO

Petitioner

vs.

TERRENCE JOYCE

Defendant

Notice is hereby given that Plaintiff, CAROL MACZKO, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order and Judgment Entry of the Honorable Sam H. Bell, United States District Judge for the Northern District of Ohio, Eastern Division, filed February 27, 1986.

/s/ Judith A. Nicely
Attorney for Plaintiff

RESPONSE TO DEFENDANTS MOTION TO DISMISS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed February 14, 1986)

Case No. C85-2431A

CAROL MACZKO

Petitioner

vs.

TERRENCE JOYCE
Officer in Charge
United States Postal Service

Defendant

Petitioner, CAROL MACZKO, filed a Petition for a Writ in the Nature of Mandamus or Mandamus on August 23, 1985. She requested that the Court mandate that the Akron Postal Service comply with the EEOC final agency order dated December 15, 1984. To date, she alleges that as a "handicapped" person:

1. She has not been reinstated with reasonable accommodation; and

2. She has not received full back pay, seniority and other benefits which have accrued from June 29, 1981, through April 17, 1985.

Carol Maczko is only before this Court on the EEOC final agency decision. Her subsequent claims filed with EEO in 1985 and 1986 are not before this Court.

Since filing her Complaint, Carol received the following payments:

Terminal leave payment (annual) pp

26 83 $1,040.98

Back pay award payment 9-25-85

$44,682.41

Two contract bonuses for 1982 & 1983 $ 700.00

$46,423.39 TOTAL AMOUNT PAID

She alleges that the back pay and benefits she should have received from 6-29-81 through 4-17-85 are as follows:

Total wages due for period above

$102,343.16

Annual leave or compensation owed

$ 5,883.98

Return of retirement fund payments

$ 1,530.53

$112,491.77 TOTAL AMOUNT DUE

$ 66,068.38 TOTAL AMOUNT TO BE PAID

Carol maintains that as a regular

full-time employee, she was entitled to eight hours of back pay per day. (Exhibit 1). The Postal Service, in a letter to Carol Maczko dated August 14, 1985, signed by Francis Fowler, also appears to have calculated her hours at eight hours per day or 40 hours per week. (Exhibit 2).

The Postal Service deducted four hours for OWCP-LWOP (Office of Worker's Compensation Program - Leave Without Pay) which Carol has never received and which matter is still on appeal. The EEO Order states that back pay shall be reduced by any <u>prior</u> award. Nor prior award has been made by any other agency.

In the EEOC final agency report and recommendation, the hearing officer refers to "light duty" in one way and the Postal Service defines "light duty" in another way. "Light duty" under the

Postal Service Contract, Article 13, requires that to be on "light duty" one must request "light duty" and the request must be supported by a medical statement. "Light duty" is a status or classification that Carol never requested. She is classified as a "handicapped" employee and requested reasonable accommodation. To be classified as "handicapped" is very different from being classified as "light duty". The difference is job status, bidding, seniority, work assignment, and work environment.

To date, Carol Maczko has not been reinstated with reasonable accommodation as stated in the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq. Reasonable accommodation under the Act is defined as follows: "(a) An agency shall make reasonable accommodation to the known

physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. (b) reasonabe accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and 92) job restructuring, part-time or modified work schedules, acquisition or modification to equipment or devices, appropriate adjustment or modification of examinations, the provision or readers and interpreters, and other similar actions.

LAW

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OF THIS CLAIM AND PETITIONER IS PROPERLY BEFORE THIS COURT PURSUANT TO 28 U.S.C. §1361 AND 28 U.S.C. §1651.

Mandamus pursuant to 28 U.S.C. §1361 is an action to compel an officer or an employee of the United States or any agency to perform a duty owed to Petitioner. Such a writ is controlled by equitable principles and it issuance is dependent upon judicial discretion. Holmes v. U.S. Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976).

Mandamus pursuant to 28 U.S.C. §1651 states a court may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. In this case, we have a final EEOC agency decision. Neither side appealed the final decision. Petitioner has not received full remedy under the recommended corrective action. Clearly, Petitioner can in this case show that:

(a) she has a right to the relief sought;

(b) Defendant has a clear duty to provide such relief; and

(c) There is no other adequate remedy at law.

Marine Engineers Beneficial Assoc. v. Adams, 447 F.Supp. 72 (N.D. Ohio 1977); United States v. Battisti, 486 F.2d 961 96ht Cir. 1973).

The cases cited by Defendant in their Memorandum to Dismiss do not support their argument that this court lacks subject matter jurisdiction. The cited cases are inappropriate and are unlike the facts of this case.

The facts in United States v. Holland, 552 F.2d 667 (5th Cir. 1977) were that there was a post office investigation of a mail fraud scheme which prison inmates were operating. The postal investigator requested that the Federal Court issue an order

compelling handwriting samples. The inmates refused and were brought before the court in contempt. The court held that the trial court had no jurisdiction to order mandamus in this case.

The facts in Product Promotions v. Cousteau, 495 F.2d 483 (5th Cir. 1974) involved a non-resident individual who had a dispute with a foreign corporation. The foreign corporation moved to dismiss the case for lack of in personam jurisdiction. This was not a mandamus case but a diversity of citizenship issue.

Allison v. City of Live Oak, 450 F.Supp. 200 (M.D. Fla 1970) was a case brought pursuant to 42 U.S.C. §1983 & §1985 (2) (3) alleging jurisdiction under 28 U.S.C. §1343 and §1331 (a). This case had nothing to do with a mandamus.

In Hamilton v. Nakai, 453 F.2d 152-(9th Cir. 1971), cert denied, 406 U.S. 945 (1972) the Hopi Indian Tribe petitioned the court for a writ of assistance to enforce their right to land to which they were co-tenants with the Navajo Indian Tribes. This matter came before the court under 28 U.S.C. §1291. In this case, the district court issued a writ to quiet title and fashioned an appropriate remedy. The court held that this relief met all requirements of 28 U.S.C. §1651, the "all Writs Act".

As in Hamilton, supra, this court derives its jurisdiction from 42 U.S.C. §2000e, et seq., a federal statute which has its exclusive remedy in federal court.

Other cases cited by Defendant support Petitioner's right to relief in

this court. In National Welfare Rights Organization v. Weinberger, 377 F.Supp. 861 (D.C. 1974) the Court held that 28 U.S.C. §1361 gave the Court original jurisdiction and an action in the nature of mandamus to compel officers or employees of the United States or any agency to perform a duty owed to plaintiff.

II. TERENCE JOYCE, ACTING OFFICER OF THE AKRON POSTAL SERVICE IS A PROPER PARTY DEFENDANT

In 42 U.S.C. §2000e-16, Title VII, the proper party defendant is the head of department, agency, or unit. Hall v. Small Business Administration, 695 F.2d 175 (C.A. Miss. 1983); Langster v. Schweiker, 565 F.Supp. 407 (D.c. Ill. 1983).

In this case, Petitioner named as Defendant, Terrence Joyce who was the

officer in charge of the Akron Postal Services. This writ was served upon Terrence Joyce, Officer in Charge of the United States Postal Service, on August 26, 1985, and the same writ was served upon the U.S. Attorney in Cleveland, Ohio, on September 16, 1985. This writ was also served on the U.S. Attorney General in Washington D.C. on November 29, 1985.

Petitioner has made sufficient notice of service and has the proper party defendant in this cause of action.

Respectfully submitted

/s/ Judith A. Nicely

Attorney for Plaintiff